QUESTIONS PRESENTED [1]

1. Whether Judge Lacey committed error in dismissing petitioner's fourth motion for reconsideration of Judge Sarokin's order, on the ground that the motion was not authorized by the Rules of the New Jersey District Court.

2. Whether, if Judge Sarokin's order is reviewable on this appeal, he committed error in:

   a. Dismissing petitioner's complaint with predjudice;

   b. Permanently enjoining petitioner from instituting suit in the Federal Court against these respondents regarding any matter alleged in the complaint that deals with the 1974 recapitalization of Missouri Pacific Railroad Company.

3. Whether Judge Lacey committed error in:

   a. Directing the Clerk not to accept, nor to docket, nor to submit to the Court any further papers in this case, except for Notice of Appeal;

   b. Permanently enjoining petitioner from instituting suit in any court against Judge Sarokin, the Clerk of the Court, or any of his subordinates, in respect of any matters involved in this action.

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1. Parent companies, Subsidiaries and Affiliates of respondents and of related companies are listed in Appendix I.

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No. 82-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES C. GABRIEL, Pro Se,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS AND JUDGMENTS BELOW

Judge Lacey's order, from which this appeal is taken, (a) denied petitioner's fourth motion for reconsideration of Judge Sarokin's order of April 7, 1981; and (b) contained affirmative directions to the Clerk and to petitioner. That order, with its findings of fact and conclusions of law, appears at Pet. 2a-17a.

Judge Sarokin's order appears at Pet. 18a-19a. The Report and Recommendation of Magistrate Perretti, which Judge Sarokin adopted as the Opinion of the Court, appears at Pet. 20a-44a. Judge Sarokin's opinion on reconsideration appears at Pet. 6a-7a.

The Third Circuit's order of affirmance appears at Pet. 48a. Its order denying reconsideration *in banc* appears at Pet. 1a.

STATUTES AND RULES INVOLVED

Rule 12(I) of the New Jersey District Court provides:

> "A motion for re-argument shall be served and filed within 14 days after the filing of the court's order or judgment on the original motion. There shall be served with the notice a memorandum, setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be re-argued orally."

Rule 23, Fed.R.Civ.P., and the pertinent portions of 49 U.S.C. § 20a are printed in Appendix II.

STATEMENT

A. *Course of proceedings below.*

Respondent Missouri Pacific Railroad Co. of Missouri (MoPac) emerged from bankruptcy pursuant to an "Agreed System Plan" approved by the Interstate Commerce Commission in 1956. It had two classes of stock: A (voting) and B (non-voting). (Pet. 22a-23a).

Petitioner owns what was formerly Class B stock (Pet. 3a). Respondent Missouri Pacific Corporation (MPC), formerly Mississippi River Corporation, owned a majority of the A stock. (Pet. 22a-23a) By a 1974 recapitalization plan, each share of B stock was converted into new common stock (Pet. 3a).

Petitioner's complaint demanded (a) declaratory relief fixing the valuation of the B shares according to a formula contained in the "Agreed System Plan"; and (b) an injunction to prevent MoPac and MPC from proceeding before the Commission with a second recapitalization plan which was approved in 1978 (Pet. 21a). A jury trial was demanded. (Pet. 3-4).

For the reasons stated in Magistrate Perretti's Report, Judge Sarokin dismissed the complaint with prejudice. He permanently enjoined petitioner "from instituting any suit in the Federal Court against any of these defendants or any other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization." (Pet. 18a-19a)

Although this order was entered on April 7, petitioner did not file a notice of appeal until July 31 (1-a to 2-a). Instead, he filed four motions for reconsideration.

The first three motions were denied by Judge Sarokin (Pet. 8a-9a). The fourth motion was reassigned to Judge Lacey, inasmuch as petitioner had filed with it a claim against Judge Sarokin for an alleged deprivation of rights in the amount of $35,000,000 (Pet. 2a).

Judge Lacey made the following conclusions of law (Pet. 15a):

> "1. Rule 12(I) authorizes a single motion for reargument; it does not permit more than one.
>
> 2. This rule cannot be circumvented by plaintiff's procedure of moving to reconsider an Order, and upon denial of that motion, moving to reconsider the Order of Denial.
>
> 3. Plaintiff's motion of June 15, 1981, repeated on June 23, 1981, being the fourth motion to reconsider Judge Sarokin's Order of Dismissal April 7, 1981, should be dismissed as not authorized by the Rules.
>
> 4. If plaintiff's foregoing motions were subject to consideration on the merits they would have to be denied, inasmuch as they do not set forth any relevant matters or controlling decisions which the Court has overlooked."

Accordingly, he dismissed the motions for reconsideration, and denied them on the merits (Pet. 16a).

Judge Lacey made the following additional conclusions of law (Pet. 16a):

> "5. The actions of plaintiff and of his brother described in the Findings of Fact and in the Report, establish the strong probability that plaintiff may continue to bombard this Court and defendants with additional repetitive papers. The Court has jurisdiction to direct the Clerk to refuse to accept, docket or submit to the Court any further papers in this action, except for a Notice of Appeal.
>
> 6. The above described actions of plaintiff and his brother establish the strong probability that plaintiff may institute suit for substantial damages against Judge Sarokin, and against the Clerk and his subordinates. The Court has jurisdiction to enjoin such frivolous and vexatious litigation, intended to harass those persons in the

> performance of their official duties, and using the courts as a stage for plaintiff's vendetta of harassment and abuse, with the result of burdening the heavy case loads of the courts and obstructing the application of justice in more meritorious cases (see Report [Pet. 35a-43a])."

His order contained the following directions (Pet. 16a-17a):

> "3. The Clerk of this Court is directed not to accept, nor to docket, nor to submit to the Court any further papers in this case, except for Notice of Appeal.
>
> 4. Plaintiff is permanently enjoined from instituting suit in any court against Judge Sarokin, the Clerk of this Court, or any of his subordinates, in respect of any matters involved in this action."

After the foregoing order was served on petitioner, he submitted seven additional pleadings in the District Court, all of which were rejected by the Clerk. He filed four petitions for mandamus in the Court of Appeals for the same relief, all of which were denied. Four applications for reconsideration *in banc* of those denials were likewise denied.

Petitioner's brief in the Court of Appeals contains the following statement (p. 27):

> "Plaintiff's rights have been completely and totally ignored, the sum of $35,000,000. So I am holding the Honorable Sarokin Court liable for the sum of $35,000,000 damages—in other words—Hon. Sarokin Court, please be careful, millions of dollars are at stake. This is a caution warning—don't treat it like dirt."

The Third Circuit affirmed Judge Lacey's judgment "after consideration of the contentions raised by appellant" (Pet. 48a) and denied rehearing *in banc* (Pet. 1a).

B. *The 1974 Recapitalization*

1. *The Southern District Court Action.*

Three Class B stockholders brought a representative action against MPC and MoPac to compel payment of higher dividends on the B stock. Judge Bryan certified the case as a class action within the provisions of Rule 23(a)(b)(1) and (2), Fed. R. Civ.

P., the members of the class being all of the Class B stockholders (Pet. 35a-36a). Petitioner participated actively in that litigation (Pet. 4a).

The suit resulted in a settlement providing that each B share would be exchanged for 16 shares of new common stock plus $850 in cash. Judge Weinfeld approved the settlement in a comprehensive opinion. *Levin* v. *Mississippi River Corporation*, 59 F.R.D. 353 (S.D.N.Y. 1973), affd. on Judge Weinfeld's opinion below *sub nom. Wesson* v. *Mississippi River Corporation*, 486 F.2d 1398 (2d Cir. 1973), cert. den. *sub nom. Wesson* v. *Levin*, 414 U.S. 1112 (1973) reh. den. 415 U.S. 937 (1974). (Pet. 4a).

The judgment declared "[t]hat the terms and provisions of the Stipulation of Settlement . . . are fair, reasonable, adequate and proper to [MoPac] and to the members of the Class consisting of all of the Class B stockholders . . ." (3-a to 5-a). This finding is binding on petitioner as a member of the class (Pet. 35a-36a).

Judge Weinfeld found the value of the exchange package to equal approximately $2,450 for each Class B share, which he found to be its fair value. 59 F.R.D., at 368-371. Petitioner's brief in the Third Circuit claimed a value of $22,500 for each share.

After denial of rehearing by this Court, three motions to vacate the judgment were denied by Judge Weinfeld. The first denial was affirmed by the Second Circuit, certiorari and rehearing were denied by this Court, and a second petition for rehearing was rejected by the Clerk. The second denial was affirmed by the Second Circuit, which denied reconsideration *en banc*, and subsequently stated that "this Court will not consider any further motions for reconsideration in this appeal." Judge Weinfeld found the third motion "vexatious" (Pet. 36a-37a).

Petitioner argues that LeVasseur, one of the three class representatives, had a conflict of interest because of ownership of both A and B stock. He argues further that Alleghany, a second class representative, had a conflict because of the Jones Motor Co. Transaction, and that this conflict was not disclosed to Judge Weinfeld (Pet. ii-iii; 45a-46a). No claim is made that there was any conflict on the part of Levin, the third class representative.

Judge Weinfeld found no merit in the allegation about Alleghany (Pet. 36a). He subsequently allowed the attorneys for Levin and LeVasseur $1,750,000, and approved reimbursement of $850,000 to Alleghany which it had paid to its attorneys. *Levin* v. *Mississippi River Corp.*, 377 F.Supp. 926, 930-932 (S.D.N.Y. 1974), affd. 508 F.2d 826 (2nd Cir. 1974), cert. den. *sub nom. Gabriel* v. *Levin*, 421 U.S. 915 (1975), reh. den. 421 U.S. 1006 (1975). He said: "The effectiveness and skill of the attorneys who espoused the interests of the Class B stockholders are attested to by the settlement itself." 377 F.Supp. at 931.

2. *The Commission's § 20a Proceeding.*

The Stipulation of Settlement required that Commission approval be obtained for the recapitalization. 59 F.R.D. at 361. Accordingly, application was made, pursuant to 49 U.S.C. § 20a, for authorization to issue the new common stock, and to exchange 16 such shares plus $850 in cash for each share of B stock. Petitioner participated actively in that proceeding. 347 I.C.C., *infra* at 397.

The Commission similarly wrote a comprehensive report approving the application. It concluded that the proposed plan of recapitalization "is fair and reasonable to all parties in interest, that it is in the public interest, and that the proposed issuance of securities meets the statutory requirements of section 20a and conforms generally with the purposes and objectives of the national transportation policy declared by Congress." *Missouri Pacific Railroad Co. Securities*, 347 I.C.C. 377, 417 (1973), affd. *sub nom. Gabriel* v. *United States*, 416 F.Supp. 810 (D.N.J. 1976) affd. 429 U.S. 1011 (1976) reh. den. 429 U.S. 1124 (1977). The Commission's order was also affirmed *sub nom. Gillespie* v. *United States*, Civ. No. 74-239-C(2) (E.D Mo. 1974). (Pet. 4a). This unreported decision is printed in 6-a to 13-a. The Commission concluded that the offer of $2,450 per share "represents fair value." 347 I.C.C. at 411.

Prior to the decision of the New Jersey Court, petitioner sought unsuccessfully by a multiplicity of motions to compel the joinder of the Internal Revenue Service as party plaintiff. After the

decision, petitioner made repeated efforts (four motions for reargument [Pet. 4a]) to convince the Court to reconsider its order affirming the Commission decision. (Pet. 38a-39a).

C. *The 1978 Recapitalization.*

In 1977, respondents MoPac and MPC filed with the Commission a petition, pursuant to 49 U.S.C. § 20a, for approval of the exchange of stock of MPC for all of the outstanding minority shares of MoPac. That is the proceeding which the instant complaint sought to enjoin (Pet. 5a).

The Commission found that the exchange offer was fair to the minority stockholders, and approved the application. *Missouri Pacific Railroad Company-Merger*, 360 I.C.C. 6, 15-20 (1978), affd. *sub nom. Wesson* v. *Interstate Commerce Commission*, No. 79-1513 (D.C. Cir. 1981)[1] This unreported judgment is printed in 14-a to 15-a.

Petitioner was a party of record in that proceeding (Pet. 27a). On May 12, 1978, the Commission entered an order reciting the decisions described in subd. B. *supra*, approving the 1974 recapitalization, and concluding (Pet. 28a):

> "Unwilling to accept the finality of those determinations, the noted commentators [including petitioner] have never exchanged their old Class B shares for the presently outstanding MoPac Common Stock, and would now have us reconsider the recapitalization proceedings. The Commission and the courts have fully reviewed and approved the recapitalization, however, and the matter is now *res judicata*".

The instant complaint was filed on July 3, 1978. Magistrate Perretti said: "It must be concluded that the plaintiff filed this action as a direct response to the Commission's decision of May 12, 1978." (Pet. 28a). "Although plaintiff dropped out of the I.C.C. proceedings, his brother, Napoleon, remained as a party of record and continued to flog the same issues in his petition for administrative review" (Pet. 39a).

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1. Consolidated with No. 79-1514, *Napoleon Gabriel* v. *Interstate Commerce Commission*.

On that administrative review, the Commission said (*Missouri Pacific Railroad Company-Merger*, 360 I.C.C. 202, 203-204 [1979] affd. *sub nom. Wesson* v. *Interstate Commerce Commission, supra*):

> "Mr. Gabriel seeks evaluation of his class B common stock according to the 1956 reorganization of MoPac. He (a) contends that the terms of the 1974 recapitalization of MoPac do not bind him since he dissented to that action; (b) alleges certain improprieties in the Court and Commission proceedings authorizing the 1974 recapitalization, . . ."
>
> * * *
>
> ". . . By seeking evaluation of unexchanged class B stock the protestants are in fact attempting a re-examination of issues finally determined in previous proceedings . . ."
>
> * * *
>
> ". . . The holders of class B stock certificates have no rights cognizable in the instant proceedings simply by reason of their dissension to the 1974 recapitalization and their refusal in the intervening years to exchange those certificates."

In affirming the Commission's order, the D.C. Circuit said (14-a to 15-a):

> "Petitioner's have engaged for several years in a quest to receive more for their class B stock than they were allotted in the 1974 recapitalization of Missouri Pacific Railroad Company. They have presented and re-presented their claim in several contexts and forums. We have reviewed the ponderous papers filed by the parties and the prior adjudications in point. Based on this review, we find the Commission's conclusion irresistible."

A petition for rehearing *en banc* by Napoleon Gabriel was denied (Pet. 13a). A second motion by Napoleon Gabriel for reconsideration of the foregoing denial was rejected as "not an authorized or proper submission," and the Court *en banc* directed the Clerk to return the motion unfiled (Pet. 13a-14a).

Despite this direction, Napoleon Gabriel submitted two further motions for reconsideration of the order denying *en banc* reconsideration. The second motion stated: "I am holding the Clerk of

this Court personally responsible for the $25,000,000 MoPac Class B values." The last two motions were neither docketed nor submitted to the Court (Pet. 14a-15a).

SUMMARY OF ARGUMENT

1. There is no error in Judge Lacey's dismissal of petitioner's fourth motion for reconsideration of Judge Sarokin's order.

2. If Judge Sarokin's order is reviewable on this appeal there is no error in his order:

(a) Dismissing petitioner's complaint with prejudice;

(b) Permanently enjoining petitioner from instituting any suit in the Federal Court against these respondents regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

3. There is no error in Judge Lacey's order:

(a) Directing the Clerk not to accept, nor to docket, nor to submit to the Court any further papers in this case except for Notice of Appeal;

(b) Permanently enjoining petitioner from instituting suit in any court against Judge Sarokin, the Clerk, or any of his subordinates, in respect of any matters involved in this action.

ARGUMENT

I.

THERE IS NO ERROR IN JUDGE LACEY'S DISMISSAL OF PETITIONER'S FOURTH MOTION FOR RECONSIDERATION OF JUDGE SAROKIN'S ORDER.

Judge Lacey was clearly correct in concluding that Rule 12(I) of the New Jersey District Court authorizes only a single motion for reargument. "Any other construction of the [Rule] would defeat its purpose" " 'to set a definite point of time when litigation shall be at an end'." *Cf. Browder* v. *Director, Ill. Dept. of Correction,* 434 U.S. 257, 264 (1978). The D.C. Circuit placed a similar construction on F.R.A.P. Rule 40 (Pet. 13a-14a).

II.

IF JUDGE SAROKIN'S ORDER IS REVIEWABLE ON THIS APPEAL, THERE IS NO ERROR IN HIS ORDER:

(a) DISMISSING PETITIONER'S COMPLAINT WITH PREJUDICE,

(b) PERMANENTLY ENJOINING PETITIONER FROM INSTITUTING ANY SUIT IN THE FEDERAL COURT AGAINST THESE RESPONDENTS REGARDING ANY MATTER ALLEGED IN THE COMPLAINT THAT DEALS WITH THE 1974 RECAPITALIZATION.

A. *Reviewability of Judge Sarokin's Order.*

Judge Sarokin's order was filed on April 7, 1981 (Pet. 18a-19a). The Notice of Appeal was not filed until July 31 (1a to 2-a), after Judge Lacey had denied petitioner's motion for reconsideration.

Petitioner's fourth motion for reconsideration of Judge Sarokin's order does not bring him within the ambit of the cases "which have held that when a court considers on its merits an untimely petition for a rehearing, . . . the time for appeal may begin to run anew from the date on which the court disposed of the untimely application." *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 210 (1952) (footnote omitted). This is so for two reasons.

First, that exception applies only to a first motion to reconsider, not to subsequent motions for the same relief, especially if the time to appeal from the original order has expired. *Ellis* v. *Richardson*, 471 F.2d, 720-721 (5th Cir. 1973); *Needham* v. *White Laboratories, Inc.*, 639 F.2d 394, 397-398 (7th Cir. 1981), *rehearing en banc denied; Hines* v. *Seaboard Air Line Railroad Company*, 341 F.2d 229, 231-232 (2d Cir. 1965).

Secondly, the extension applies only when a rehearing is granted, and the court undertakes a complete review of the merits as the basis for denying the motion. It does not apply here, where the motion was dismissed as not authorized by Rule 12(1) of the District Court. And even if subject to consideration on the merits, it would have to be denied inasmuch as it did "not set forth any relevant matters or controlling decisions which the Court has overlooked" (Pet. 15a), as required by the Rule. *Cf. Pfister* v. *Finance Corp.*, 317 U.S. 144, 150-151 (1942).

B. ***Dismissal of the Complaint.***

The claim for a declaration fixing the valuation of the Class B shares according to a formula contained in a certain agreed systems plan was properly dismissed on the ground of *res judicata*, for the reasons stated in Magistrate Perretti's Report (Pet. 35a-40a). As the D.C. Circuit said (15-a): ". . . [W]e cannot conceive a case more appropriately subject to the law of *res judicata*."

The claim to enjoin the 1977 recapitalization was properly dismissed on the ground of lack of subject matter jurisdiction, for the reasons stated in Magistrate Perretti's Report (Pet. 27a-35a). The recapitalization was consummated on November 1, 1978, pursuant to the order of the Interstate Commerce Commission. *Missouri Pacific Railroad Company-Merger*, *supra*, 360 I.C.C. 202, 203 (1979).

C. ***Injunction of Further Proceedings Against Defendants.***

Respondents' motion to enjoin petitioner from further proceedings against respondents "regarding any matter alleged in the complaint that deals with the 1974 recapitalization" was properly granted for the reasons stated in Magistrate Perretti's Report (Pet. 40a-43a), and in Judge Sarokin's opinion (Pet. 6a-7a). This necessity is confirmed by the many papers filed by petitioner subsequent to the order appealed from (p. 4, *supra*).

III.

THERE IS NO ERROR IN JUDGE LACEY'S ORDER:

(a) DIRECTING THE CLERK NOT TO ACCEPT NOR TO DOCKET NOR TO SUBMIT TO THE COURT ANY FURTHER PAPERS IN THIS CASE, EXCEPT FOR NOTICE OF APPEAL;

(b) PERMANENTLY ENJOINING PETITIONER FROM INSTITUTING SUIT IN ANY COURT AGAINST JUDGE SAROKIN, THE CLERK, OR ANY OF HIS SUBORDINATES, IN RESPECT OF ANY MATTERS INVOLVED IN THIS CASE.

A. ***The Direction to the Clerk.***

The innumerable motions for reargument by petitioner from the decision of Judge Weinfeld, and from the three-Judge District Court in New Jersey; the four motions for reconsideration in the District Court in this case; the seven pleadings submitted after Judge Lacey's order was served upon appellant; the four petitions

for mandamus and the four petitions for *en banc* rehearing of the denial of those petitions; the petitions of Napoleon Gabriel in the D.C. Circuit Court of Appeals: all amply support Judge Lacey's conclusion that "the actions of plaintiff and of his brother . . . establish the strong probability that plaintiff may continue to bombard this Court and defendants with additional repetitive papers" (Pet. 16a).

This restriction against filing further papers is the only sanction which will protect the court and defendants. This is the sanction found appropriate by the D.C. Circuit, and by the Second Circuit (pp. 5, 8, *supra*).

B. ***The Injunction Prohibiting Suits Against Judge Sarokin and the Clerk or his Subordinates.***

The threat to sue Judge Sarokin for $35,000,000 in appellant's fourth motion, repeated in his brief in the Court of Appeals; and the threat by his brother, his *alter ego*, to sue the Clerk of the D.C. Circuit Court of Appeals for $25,000,000, amply justify Judge Lacey's conclusion that "the above described actions of plaintiff and his brother establish a strong probability that plaintiff may institute suit for substantial damages against Judge Sarokin and against the Clerk and his subordinates" (Pet. 16a). The discussion justifying protection for defendants would apply *a fortiori* to an injunction protecting Judge Sarokin and the Clerk.

CONCLUSION

Since the petition does not satisfy any of the requirements of Rule 17 of this Court, it should be denied.

Respectfully submitted,

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November 19, 1982

APPENDIX I

Parent Companies, subsidiaries and affiliates of respondents.

Missouri Pacific

Abilene & Southern Railway Company
Alton & Southern Railway Company, The
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Belt Railway of Chicago
Brownsville & Matamoros Bridge Company
Chicago & Western Indiana Railway Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railway
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Illinois Terminal Railroad Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Mississippi River Transmission Company
Missouri Improvement Company
Missouri Pacific Airfreight, Inc.
Missouri Pacific Corporation
Missouri Pacific Equipment Corp.
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
MRT Exploration Company
Park Spring, Inc.
Pueblo Union Depot and Railroad Company, The
Ric-Con Corporation
Southern Illinois and Missouri Bridge Company
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Weatherford Mineral Wells and Northwestern Railway Co., The

Appendix I

By decision dated October 20, 1982, the Interstate Commerce Commission authorized acquisition by Union Pacific Corporation of control of respondents Missouri Pacific Corporation and of Missouri Pacific Railroad Company; and also of Western Pacific Railroad Company. *Union Pacific—Control—Missouri Pacific, Western Pacific*, 366 I.C.C. 459. The following lists the parent companies, subsidiaries and affiliates of Union Pacific Corporation and of Western Pacific Railroad Company.

Union Pacific

Bitter Creek Coal Company
Calnev Pipe Line Company
Camas Prairie Railroad Company
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin Indonesia, Inc.
Champlin International Petroleum Company
Champlin Peru, Inc.
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Philippines, Inc.
Champlin Pipeline, Inc.
Champlin Trading Company
Denver Union Terminal Railway Company, The
Des Chutes Railraad Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
Mount Hood Railway Company
Ogden Union Railway and Depot Company, The
Oregon Short Line Railroad Company
Oregon-Washington Railroad & Navigation Company
Pacific Subsidiary, Inc.

Appendix I

Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Separation Creek Coal Company
Spokane International Railroad Company
St. Joseph and Grand Island Railway Company, The
St. Joseph Terminal Railroad Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Foundation
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Resources Corporation
Union Pacific Resources Ltd.
Union Subsidiary, Inc.
UP Leasing Corporation
UP Subsidiary Corporation
Upland Industries Corporation
Wasatch Insurance Limited
Winton Coal Company
Yakima Valley Transportation Company

Western Pacific

Alameda Belt Line
Central California Traction Company
Delta Finance Company Ltd.
Oakland Terminal Railway
Sacramento Northern Railway
Standard Realty and Development Company
Tidewater Southern Railway Company
WPX Freight System, Inc.

APPENDIX II

49 U.S.C.

§ 20a. *Securities of carriers; issuance, etc.*

* * * * *

Issuance of securities; assumption of obligations; authorization

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect to the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

* * * * *

Scope of commission's authority

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms

and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, of the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

* * * * *

Jurisdiction of commission as exclusive and plenary

(7) The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

Rule 23. Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of

members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

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NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, NEW JERSEY

JAMES C. GABRIEL,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M. M. HENNELLY, JOHN H. LLOYD, D. B. JENKS AND THOMAS H. O'LEARY,

Defendants.

Civil No. 78-1476 JURY TRIAL

Notice of Appeal

To: The Third Circuit
Court of Appeals

TO: THE CLERK OF THE COURT
HON. ANGELO W. LOCASCIS

Sir:

PLEASE TAKE NOTICE that James C. Gabriel, on behalf of himself appeals to the United States Court of Appeals, Third Circuit, the final Order or Judgment dated the 22nd day of July, 1981 of the Federal District Court, District of New Jersey, Newark, New Jersey, Docketed and Entered and Filed July 23, 1981,

in the above Captioned Case and appeals each and every prior Order and Decision of the said Court which supports the said Judgment or Order.

Respectfully,

[JAMES C. GABRIEL]
James C. Gabriel, Pro Se
P. O. Box 94,
Sea Girt, New Jersey 08750

Monmouth County
State of New Jersey
Dated: July 31, 1981

Service to:
HON. U. S. D. J. F. B. LACEY
HON. U. S. D. J. J. LEE SAROKIN
MAGISTRATE SERENA PERRETTI
THE OFFICE OF THE COMMISSIONER
PAUL E. GRAHAM, ESQ.
LEON LEIGHTON

FINAL JUDGMENT OF JUDGE WEINFIELD

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 5095 (EW)

BETTY LEVIN, ALLEGHANY CORPORATION AND ROBERT LEVASSEUR,

Plaintiffs,

—against—

MISSOURI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T.C. DAVIS and THOMAS F. MILBANK,

Defendants.

The parties to this action having submitted to the Court for its approval, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, a Stipulation of Settlement dated December 18, 1972; and

By Order dated December 20, 1972, the Court having directed that a hearing be held on January 25, 1973, to determine whether the terms and provisions of the Stipulation of Settlement were fair, reasonable, adequate and proper and should be approved, and to determine whether final judgment should be entered in accordance with the Stipulation of Settlement and having directed that notice of the settlement hearing be given to the MoPac stockholders in a manner specified in the order; and

Notice of the hearing having been given to the stockholders in accordance with the order of December 20, 1972, it having been mailed, on December 27, 1972, to all stockholders of record of defendant Missouri Pacific Railroad Company, as of the close of

business on December 26, 1972, and it having been published in the national edition of *The Wall Street Journal* on December 27, 1972; and

On January 25, 1973, a hearing having been held to determine whether the proposed settlement embodied in the terms and provisions of the Stipulation of Settlement should be approved and at that hearing an opportunity having been provided for all proponents of and objectors to the proposed settlement to be heard and to submit papers for the consideration of the Court; and

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion on March 19, 1973, and having determined that a final judgment should be entered; it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the terms and provisions of the Stipulation of Settlement dated December 18, 1972, are fair, reasonable, adequate and proper to the Missouri Pacific Railroad Company and to the members of the class consisting of all of its Class B stockholders, and the same are hereby approved, as per the opinion of the Court dated March 19, 1973.

2. That the notice to the stockholders of the hearing was fair, adequate and sufficient and constituted compliance with Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure.

3. That any and all objections to the terms and provisions of the Stipulation of Settlement are hereby overruled.

4. That the parties to the Stipulation of Settlements are hereby authorized and directed to consummate the settlement of this action pursuant to the terms and provisions of the Stipulation of Settlement.

5. That thereupon the Complaint and Amended Complaint of Betty Levin, the Complaint and Amended Supplemental Complaint of Alleghany Corporation, and the Complaint of Robert LeVasseur are hereby dismissed as against all defendants on the merits, with prejudice and without costs to any party.

6. That the Court retains jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fee and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation.

Dated: New York, New York
May 2, 1973

EDWARD WEINFELD
U.S.D.J.

Judgment entered:
May 2, 1973

THOMAS E. ANDREWS
Acting Clerk

JUDGMENT OF MISSOURI EASTERN DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LABELLE GILLESPIE,
Plaintiff,

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION,
Defendants,
MISSOURI PACIFIC RAILROAD COMPANY,
Intervenor-Defendant.

Nov. 14, 1974

WILLIAM D. RUND,
Clerk
U.S. DISTRICT COURT
E. DISTRICT OF MO.

No.74-239-C(2)

Before WEBSTER, Circuit Judge, WANGELIN and REGAN, District Judges.

REGAN, Judge

By this action heard to a three-judge court, plaintiff seeks to set aside and annul orders of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act granting authority to the Missouri Pacific Railroad Company (MoPac) to issue securities in connection with a plan of recapitalization. Plaintiff is one of several MoPac stockholders who opposed the plan both before the Commission and previously. We have jurisdiction under Sections 1336(a), 1398(a), 2284 and 2321-2325, 28 U.S.C.

The background of this controversy is set forth in detail both in the comprehensive 71 page report of the Commission and in Judge Weinfeld's opinion in *Levin* v. *Mississippi River Corporation*, D. C. N.Y., 59 FRD 353. We briefly summarize.

MoPac is a Missouri corporation which was reorganized in 1956 under Section 77 of the Bankruptcy Act (Section 205, 11 U.S.C.). Upon reorganization, MoPac was authorized to issue two classes of $100 stated capital no par stock: Class A which

was issued to former preferred stockholders and Class B issued to former common stockholders. Class A stock was preferentially entitled to non-cumulative dividends of not to exceed $5 per share annually. Each share of both classes was entitled to one vote. Class A stock, which constituted 98 per cent of the total stock, had operational control over the corporation (e.g., power to elect the Board of Directors), but in certain other important areas such as mergers, consolidations and reorganizations involving the issuance of additional stock or the alteration of rights of either class of stock, the separate consent of a majority of both classes was required, thus giving a majority of the numerically small number of Class B shares veto power over such matters. See *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162.

By 1963, Mississippi River Corporation (Mississippi) had acquired a majority of the Class A shares while Alleghany Corporation (Alleghany) had become the owner of a majority of the Class B shares. Thus, since 1963, Mississippi has elected MoPac's Board of Directors and Alleghany exercised a veto power independent of the other Class B shareholders as to any corporate action necessitating Class B shareholder approval.

Understandably, because of MoPac's increased earnings and other factors, Class B shareholders, led by Alleghany, had become dissatisfied, to say the least, with MoPac's dividend policy of paying only $5 per share annually on Class B stock. As a result, a class and derivative action (*Levin* v. *Mississippi River Corporation*, supra) was instituted in which it was alleged, inter alia, that the defendants were parties to a conspiracy to "freeze out" Class B stockholders by various methods including the payment of unreasonably low dividends, that Mississippi had misused its majority voting power, and that defendants had breached their fiduciary duties. The major relief sought was an order compelling the payment of higher past and future dividends. The director defendants in that suit asserted that their dividend policy was justified by prudent business judgment made in good faith.

Judgment of Missouri Eastern District Court

Thereafter, commencing in 1968 and continuing until the latter part of 1972, the parties to the *Levin* litigation (including Alleghany, two other minority B stockholders, Mississippi and MoPac) undertook extensive and thorough pre-trial discovery, following which a settlement was agreed upon on the basis of a restructured capitalization which would, if consummated, eliminate the underlying cause of the constant stress between Class A and Class B shareholders.

On March 19, 1973, in an exhaustive opinion, Judge Weinfeld approved the proposed settlement as fair and reasonable, noting that "it offered a permanent solution to the long-standing impasse between the two contending groups of stockholders." 59 FRD at 373. The District Court decision was affirmed without opinion on appeal by the Second Circuit, 486 F.2d 1398, and certiorari was denied.

As summarized by Judge Weinfeld, the settlement provided for a Plan of Recapitalization and a proposed Amendment to MoPac's Articles of Association subject to its stockholders' approval to bring about the following:

> "(1) [E]ach share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,057 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;
>
> (2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac."

Thus, in addition to the required approval of the Interstate Commerce Commission for the issuance of the new shares, the recapitalization plan could not have been effected without the consent of 75 per cent of the outstanding stock of each class including a majority of the shares of each such class held by others than Mississippi and Alleghany. Substantially more than

the necessary number of shares having voted in favor of the recapitalization plan, the issue before the Interstate Commerce Commission was whether it should grant its approval under Section 20a to issue the securities called for in the plan of recapitalization.

After a hearing at which all parties were accorded the right to present evidence and arguments, the Commission issued its report and order on December 14, 1973, granting MoPac's application, the order being made effective immediately in view of the deadline set forth in the settlement agreement. On December 28, 1973, the Commission denied petitions to stay the effective date of its December 14, 1973 order, and on January 23, 1974, it denied petitions for reconsideration of that order. On March 4, 1974, the Commission denied petitions seeking a finding that an issue of general transportation importance is involved. The plan of recapitalization was consummated on January 21, 1974, and this suit followed on April 2, 1974.

The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any manner permitted by the laws of Missouri. And Section 388.220, R.S.Mo., specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was the very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be "for some lawful object within [MoPac's] corporate purposes and compatible with the public interest," and would be "reasonably necessary and appropriate for such purpose."

The Commission recognized that the rights of minority stockholders are a part of the public interest, so that in determining

whether the transaction was "compatible with the public interest," it was required "to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders."

In reaching its conclusion that the proposed plan was in the best interest of the stockholders and the carrier and was compatible with the public interest, the Commission considered the fact that the recapitalization plan had been agreed upon after extensive arms-length bargaining between MoPac, Mississippi, and Alleghany, and approved by the court in the *Levin* case, the value per share of the Class A and Class B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearing, and the arguments and contentions in their briefs. In addition, consideration was given to the fact that the elimination of the veto power held by the Class B stock would have the effect of simplifying the structure of MoPac stock and that the conversion feature of the new stock might result in an all-common stock structure. It was the opinion of the Commission that the proposed plan would provide an effective means for the payment of higher dividends, would render equity financing more feasible, would more equitably distribute the voting power among the stockholders, would eliminate the confusion between Class A and B stockholders and would thereby enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.

The principal contention of plaintiff and other minority Class B stockholders to the effect that the recapitalization plan unlawfully deprived them of a substantial portion of the full value of their Class B stock. In large part, the protestants, including plaintiff, argued that the Class B stock, at the minimum, should have been valued at "book value" ($9000 per share) if not at a higher up-dated valuation in excess of that figure.

The claim was considered at length by the Commission in light of the pertinent evidence. In rejecting "book value" as the measure of the actual value of the Class B stock, the Commission held

that bookkeeping entries evidencing "book value" are of little significance in measuring the actual value of a going company such as MoPac. Instead, based on the testimony of expert witnesses, the Commission utilized the capitalized earnings method, as the result of which it held that the Class B shareholders would in fact receive "value for value." See in this connection the enlightening discussion in *Levin* v. *Mississippi River Corporation*, supra, 59 FRD lc 369ff; *Schwabacher* v. *United States*, 334 U.S. 182; and *Borg* v. *International Silver Company*, 2 Cir., 11 F.2d 147, 152.

Other contentions of plaintiff, rejected by the Commission, included: (1) that an "immutable" contract was created by the 1956 plan of reorganization which could not be altered over the dissent of a single Class B shareholder; (2) that the settlement plan approved by Judge Weinfeld has a "congenital defect" in that the *Levin* suit for dividends was "illegally" converted into a suit for recapitalization; (3) that the settlement plan was "forced" upon the Class B shareholders by "court fiat;" (4) that the proxy statement for the stockholders' meeting was false and misleading; and (5) that MoPac, Mississippi, and their respective boards' directors were guilty of conspiracy, fraud and deceit.

We agree that the Commission's findings on these issues were warranted. So, too, we find no merit to plaintiff's further assertion that Alleghany "sold out" the other Class B stockholders by entering into the settlement agreement. As the Commission noted in its report: "Alleghany as the majority owner of the Class B stock has spent considerable sums of money over the years to protect its interest. It is the party to the agreement that has the most to gain and the most to lose. Under the circumstances, there is little or no likelihood that Alleghany would agree to surrendering its stock for less than fair value. Besides all the evidence of record contraindicates that Alleghany agreed to accept less than fair value."

Our sole function in this proceeding is to determine whether the orders of the Commission are supported by substantial evidence

on the whole record and do not involve an error of law. *Norfolk & Western Railway Co.* v. *United States*, D. C. Mo., 316 F.Supp. 1396, 1399. In our judgment, the Commission applied correct legal standards in its consideration of the application and its ruling thereon. The evidence before the Commission, which is summarized in its report and which need not be here repeated, amply supports the order granting MoPac's application.

Accordingly, judgment will be entered affirming the orders of the Commission and dismissing the complaint.

Dated this 14th day of November, 1974.

WILLIAM H. WEBSTER

Judge, U. S. Circuit Court

JOHN K. REGAN

Judge, U. S. District Court

H. KENNETH WANGELIN

Judge, U. S. District Court

JUDGMENT OF D.C. CIRCUIT COURT OF APPEALS

Not to be Published—See Local Rule 8(f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[NO OPINION]

NO. 79-1513, 79-1514
SEPTEMBER TERM, 1980

WILLIAM R. WESSON,

Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA

Respondents

Filed March 25, 1981

GEORGE A. FISHER

Clerk

Petition on Review of an Order of the Interstate Commerce Commission.

Before: ROBB, WILKEY, AND GINSBURG, CIRCUIT JUDGES.

JUDGMENT

This case came on for consideration on petitions for review of an order of the Interstate Commerce Commission and on the briefs filed by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

Petitioners have engaged for several years in a quest to receive more for their Class B stock than they were allotted in the 1974 recapitalization of Missouri Pacific Railroad Company. They

have presented and re-presented their claim in several contexts and forums. We have reviewed the ponderous papers filed by the parties and the prior adjudications in point. Based on this review, we find the Commission's conclusion irresistible.

The matters petitioners would raise yet again have been carefully considered and rationally determined by several courts and by the Commission itself in earlier proceedings. No new issue of substance appears in the briefs before us. While we do not on this occasion enter a coercive order against petitioners, *cf. James C. Gabriel* v. *Missouri Pacific Railroad*, Civil No. 78-1476 (D.N.J. March 6, 1981) (adopting December 31, 1980 Magistrate's Report and Recommendation), we cannot conceive a case more appropriately subject to the law of res judicata. "Finality . . . is the service rendered by the courts through the operation of the law of res judicata." Restatement (Second) of Judgments, Introduction at 13 (Tent. Draft No. 7, 1980). By this order we perform that service.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed.

Per Curiam

For the Court

GEORGE A. FISHER
George A. Fisher, Clerk